

WEEKLY CLARION, NOVEMBER 29, 1866.

DAILY CLARION.

DECISIONS OF THE HIGH COURTS OR ERRORS AND APPEALS.

APRIL TERM, 1866.

Reported Expressly for the Clarion.

R. H. Malone, exec't of James Mooring,
John Mooring et al.
Appeal from the Probate Court of Marshall County.

Judge Elliott delivered the opinion of the court.

John and Willie Mooring, by their next friend, filed their petition in the Probate Court of Marshall county, at March term, 1866, against R. H. Malone, exec't of James Mooring, deceased, who was the father of the petitioners, in which they allege that the said James Mooring died on the first day of May, 1857, leaving a last will and testament, which was admitted to probate on May term, 1857, and of which the appellant is the surviving and acting exec'tor. That by one clause of said will the testator bequeathed to the petitioners, John Mooring, when he reached the age of nineteen years, slaves to the amount of \$3,350, and to the petitioners, Willie, his daughter, and to his other four daughters \$4,000, to be paid them in slaves at a valuation fixed by said will, and \$350 in money. That Lucy, one of the said four daughters, has died intestate and unmarried, without having received her said legacy, but that all the other legatees received their legacies in negroes, as early as 1858, and either sold or enjoyed them. That petitioners, John Mooring, arrived at the age of nineteen on the 1st of February, 1866. That the slaves are now free, but there are sufficient assets to pay said legatees in money, and that they are entitled to have the said out of the general assets of

"...they cannot be paid out of the slaves. The petitioners say that the construction of the will may be settled, and that the exec'tor be decreed to pay the said legatees in money.

The answer of the appellant admits the facts as stated in the petition, and submits the construction of the will to the court:

The clauses of the will bearing upon the matter in question are as follows, to wit:

Item 4. I give my son John Mooring, four hundred acres of land in Texas, Bexar county, it being the same land bought of Doctor John Jameson by me, for which the said John Mooring is to pay \$800. I also give him negroes to the amount of \$3,350, men at \$800, and women at \$600, and smaller negroes in the same proportion.

Item 5. I give my daughters, Mirred, Susan, Rebecca, Willie, and Lucy, thirty three hundred and fifty dollars each, to be paid them at the age of twenty or of marriage, three thousand dollars in negroes, to be valued the same as those given to my son John in Item 4, and three hundred and fifty dollars in money. It is my wish and desire that the negroes given to my daughters be as much in families and as many of them females as circumstances will admit of. The negroes given to my above named daughters are given to them during their lifetime, and at their death to their children, if any.

Item 6. It is my will and desire that my estate be kept together, farm worked as present, that my children, Susan, Rebecca, Willie, John and Lucy, be raised and educated as nearly like my older children as circumstances will admit of, and the expenses to be paid out of my estate.

Item 7. When my son John arrives at the age of nineteen years, his legacy is to be given to him if my executors think best or safe to do so."

The remaining clauses of the will dispose of the residue of his estate, "after all the legacies above provided for have been paid out," equally among all his children; (of whom he had others living besides those before named,) and the children of his deceased children, but no division to be made until his son John should arrive at the age of nineteen; and provision is made for the management of the property and the care and custody of the younger children.

The Probate Court decreed that the exec'tor should pay the legacies out of any monies in his hands as exec'tor, upon petitioners giving refunding bonds; and the exec'tor appeals from this decree.

It is to be observed that the legacy to the petitioners, John Mooring, is to be given him at the age of nineteen, only at the discretion of the exec'tor, if he should "think best or safe to do so," and it is not shown that the petitioners, Willie, have reached the age of twenty, or has been married. No objection, however, is raised on those grounds. The object of the parties seems to be to obtain a judicial construction of the will, and as the conclusion to which we have come on that question does not require that we should notice these formal points, we will consider the case on the merits.

The appellant is not represented in this court, by counsel, and we are left without the benefit of the views he maintains in opposition to the claims of the appellees; and it does not appear that the other residuary legatees, who are to be prejudiced by a decree in favor of the appellees, have any notice or knowledge of the pendency of this proceeding.

On behalf of the appellees it is contended that the legacies contained in the fourth and fifth clauses of the will are pecuniary legacies, and that the slaves are referred merely for the purpose of indicating the fund out

of which the money is, in the first instance, to be raised, and that upon the failure of that fund, the legacies are to be paid out of the general assets. And the question is, whether they are general pecuniary legacies, with a specific fund pointed out, as a convenient mode of payment, or specific bequests of slaves, the number to be limited by the criterion of pecuniary value prescribed by the will.

A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity in the nature of specific legacies, as of ancient money, referred to a particular fund for payment. This kind of legacy is called by the civilians a demonstrative legacy; and it is so far general, and differs so much in effect from one properly specific, that if the fund be failed in, or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets, yet the legacy is so far specific, that it will not be liable to attach with general legacies upon a deficiency in the estate, and prevent the execution of the will.

The adjudged cases on legacies similar to those under discussion, sustain the conclusion to which we have arrived. Legacies of money, payable out of a particular fund or security, which failed, are held to be general legacies. *Roberts vs. Poosch*, 4 Vesey, p. 150. *Coleman vs. Coleman*, 2 Vesey, p. 639. *Galingher vs. Galingher*, 2 Wills, 173. and in *Airby vs. Potter*, 4 Vesey, p. 748. Legacy of £1,000, "out of my reduced bank annuities," was held a general legacy, but the Master of the Rolls said: "If this legacy had been expressed thus: 'part of my reduced bank annuities,' or 'in my reduced bank annuities,' I could not have considered that the testator meant anything but an *identical part of the corpus*." So a bequest of "part of my stock of horses as shall select, to be fairly valued and appraised, to the amount of £800," was held to be a specific bequest. *Richards vs. Richards*, 9 Price, 219. *Exchequer Rep.*, 93. A bequest of £3,914, "in notes, to be taken out of my notes as soon after my death as it can be done," was held to be a specific legacy. *Perry vs. Maxwell*, 2 Davenport Equity Rep., 562. For paying taxes at the original date of principal stocks, etc., other clerks and one employee from January one to June thirty, eighteen hundred and sixty-one, two thousand four hundred and fifty dollars and thirty cents.

For building a custom-house, and lighting additional accommodations in the east wing, for more feeding for the west wing, and for the extension and replanking of the coal wharf, ten thousand dollars.

For continuation of the wall enclosing the grounds of the hospital, ten thousand dollars.

For removing and repairing three old frame houses and building two new cottages for the occupation of the employees of the hospital having families, six thousand dollars.

Post Office.—For expenses of receiving, arranging, and taking care of copyright books, charts, and other copyright matter, one thousand eight hundred dollars.

For compensation for temporary clerks in the Post Office for the current fiscal year, twenty thousand dollars.

Hospital Hospital for the Insane.—For the support, clothing and medical treatment of the insane of the army and navy and the revenue cutter service, and of the District of Columbia, at the government hospital for the insane in said District, including five hundred dollars for books, stationery, and incidental expenses, ninety thousand five hundred dollars.

For compensation for temporary clerks in the Post Office for the current fiscal year, twenty thousand dollars.

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